

Chhum (Migration) [2023] AATA 1370 (12 May 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs Savy Chhum Miss Sreyneat Chea Miss Sreynet Chea Mr Somnang Chea Miss Srey Ny Chea
REPRESENTATIVE:	Mr Meng Bunlay (MARN: 1794554)
CASE NUMBER:	2211625
HOME AFFAIRS REFERENCE(S):	BCC2017/3896287
MEMBER:	David Crawshay
DATE:	12 May 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211 of Schedule 2 to the Regulations; and • cl.820.221 of Schedule 2 to the Regulations.

Statement made on 12 May 2023 at 2:16pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – money transfers – limited knowledge of each other’s financial affairs – responsibility for children not shared – joint social engagements – relationship developed rapidly – companionship and emotional support – length of the relationship – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; r 1.15

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s.65 of the *Migration Act 1958* (Cth) (the Act).
2. The first-named applicant (hereafter referred to as the applicant) applied for the visa on 20 October 2017 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211 because the delegate was not satisfied that she was the spouse of the sponsor at the time of application.
4. The applicant appeared before the Tribunal on 20 December 2022 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Khmer and English languages.
5. The applicants were represented in relation to the review. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant was the spouse of the sponsor at the time of application and continues to be his spouse at the time of this decision.

Whether the parties are in a spouse or de facto relationship

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
9. "Spouse" is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Tribunal has sighted a copy of a certificate for a marriage that took place on 8 April 2017. It is satisfied that the certificate is genuine and that the parties are free to marry each other. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects of the relationship

11. Based on the applicant's testimony at hearing, the Tribunal finds that the parties do not have any joint ownership of real estate or other major assets, nor do they have any joint liabilities. These aspects are given no weight.
12. The Tribunal now turns to the extent of any pooling of financial resources. At hearing, it asked the applicant if both parties use the joint account, to which she replied that the majority of transactions are her withdrawing money. It suggested to her that the parties appeared to be maintaining separate accounts based on the account statements provided. She replied that she has another account for herself which she opened in November 2022. The Tribunal questioned her on the pattern whereby money was transferred to the joint account from an account ending in xx0025 and then back into that account. She replied that when the sponsor requires money, she gives it to him and vice versa.
13. At this point, the Tribunal asked the applicant how they bring their financial resources together if they maintained separate accounts. She replied that they trust each other. She said that they want to save money into the one account but have not been able to do so because of food and things for her children. In response, the Tribunal put to the applicant that while she has a modest wage, the sponsor earns around \$90,000-a-year based on the information in front of it. It put to her that the parties would be able to save some money from this wage. The applicant replied that the sponsor mostly saves the money in his own account. When it asked how much was in his account, she replied that she did not know as she does not know how to use mobile banking. When asked if he ever told her how much money he has, she replied that he had told her that he has some savings but did not divulge the amount.
14. The Tribunal has considered the information in front of it including the above information. It harbours some concerns about what it considers to be the parties' lack of financial integration, not necessarily because they maintain separate accounts (which is increasingly a feature of relationships), but because the applicant appears to have very little if any knowledge of the sponsor's financial affairs including how much money is in his personal account and no plausible reason has been given by her as to why this is the case. It places some adverse weight on this aspect of the relationship.
15. The Tribunal heard from the applicant that the parties do not owe any legal obligations in respect of the other. This aspect is given no weight either way.
16. Lastly, and in relation to the basis of any sharing of day-to-day household expenses, the Tribunal heard from the applicant that she works part-time and the sponsor "shares" the cost of everyday expenses. In declarations from December 2022, the parties wrote that they mainly operate in cash when attending to groceries or rent but that the sponsor sometimes gives cash to the applicant. The applicant also submitted bank statements from the parties' joint bank account for dates in 2021 and 2022. However, for the most part these statements show salary payments being deposited from the applicant's employer followed closely by

cash withdrawals of a similar sum, although there have lately been card payments for what appear to be grocery purchases. In addition, some utility payments can be cross-referenced, such as, for example, a post office payment on 22 November 2022 for a gas bill and on 17 May 2022 for a mobile phone bill. These payments further substantiate that the joint account was operated by the applicant, but they are not by themselves indicative of the parties sharing day-to-day household expenses.

17. The parties claim in the declarations from December 2022 that they transfer money to each other. To this end the Tribunal accepts that nine transfers were made from the joint account to the sponsor's personal account totalling just under \$3,600 (with one of these transfers being for the sum of \$2,343 in August 2021) and four transfers totalling \$2,750 being made the other way (including one transfer of \$2,000 in October 2022) over the period from 1 July 2021 to 13 December 2022. It accepts that this shows transfers having taken place between the parties. However, it notes that they are not in any way regular transfers that may signify transferring money for day-to-day expenses. Instead, they are ad hoc, "lumpy" payments that are dominated by two particularly large transfers – one out of the applicant's account and one into it. Needless to say, these transfers and their purposes have not been explained by the parties. In the absence of such an explanation, the Tribunal does not place much weight on them as indicating that the parties share day-to-day household expenses.
18. The Tribunal has considered the evidence relating to the financial aspects of the relationship but finds that it demonstrates that the parties have pooled their resources to a very limited extent.

Nature of the household

19. The Tribunal has firstly considered whether the parties have any joint responsibility for the care and support of children. In this regard, it notes that the applicant has four children – being the secondary applicants. However, there is very little information to demonstrate that the sponsor has shared in the care and support of these children. In particular, none of the secondary applicants attended the Tribunal or gave any evidence about how the sponsor offers care and support to them. At hearing, the Tribunal heard from the applicant that while all four of her children live with them, the responsibility for care and support of these children is mostly her burden because the sponsor works away from home. She said that none of the sponsor's children lives at home with them. The Tribunal has considered the information in front of it but gives it very little weight.
20. Turning to the parties' living arrangements, the Tribunal notes that several pieces of correspondence addressed to one or both parties at various addresses that are said to be their residences, including bills for utilities. It acknowledges that such evidence may be generated with little or no verification process, a point made in the delegate's decision. However, it has also had regard to a lease agreement for a property in Carrum Downs and photographs that correspond with the interior of this property according to open source information (Realestate.com.au), to which it gives weight. Based on this information, it accepts that the parties have been living together since the applicant arrived in 2017.
21. As to the sharing of housework, the applicant told the Tribunal that it was her responsibility when the sponsor was living away but that the parties shared responsibility when he returned. She said that the sponsor lives away for between two-to-three weeks each time and that he is back in Melbourne for irregular amounts of time ranging from three days-to-two weeks. The Tribunal accepts this evidence.
22. The Tribunal has considered that the evidence of the nature of the parties' relationship indicates that they have been living together, or not living separately and apart on a permanent basis, at the time of application or at the time of this decision.

Social aspects of the relationship

23. At hearing, the applicant said that she always mentions to people that the parties are husband and wife. She said that the parties' wedding took place at a friend's house in Melbourne. She said that the guests were friends of the sponsor.
24. The Tribunal has had regard to several photographs of the parties and the applicant's children. Some of these were taken at the parties' wedding in April 2017 which was a modest affair. Others were taken at social engagements such as a wedding of the sponsor's friend in December 2022, as well as when the parties went out for meals and on trips around Victoria with the applicant's children. It gives these photographs some weight although it notes that very few depict third parties.
25. The parties submitted several Form 888 statutory declarations from people who claim to know the parties. These declarations show that there is some acknowledgment of the parties' relationship from their friends. This evidence is given some weight.
26. The Tribunal has considered information showing that the sponsor has provided the applicant's details in the dedicated "spouse" section of his tax return for FY2020/21, albeit that this document is unsigned and there is no evidence to show that it was filed. It gives this document some weight as evidence of him representing the parties' relationship to an Australian Government agency.
27. The Tribunal has considered the information in front of it, including the above information. It accepts that the parties have represented themselves to some of their friends as being married to each other and that these people recognise them as being in a married relationship.
28. The Tribunal finds that evidence of the social aspects of the relationship points to the parties having been in a genuine and continuing relationship at the time of application and at the time of this decision.

Nature of the parties' commitment to each other

29. The Tribunal has had regard to documents on the Department and Tribunal files as well as the parties' individual testimony at hearing. The parties both claimed that they met through someone called "Mom". It accepts that the applicant knew Mom personally and that the sponsor knew someone in Australia who was friends with Mom. It accepts that this all occurred in or around May 2015.
30. At hearing, the Tribunal put to the parties a concern raised by the delegate in his decision about the seemingly rapid development of their relationship. The sponsor responded by saying that the parties began talking in late-May 2015 and that he went to Cambodia at the end of the year [in December 2015], when he told the applicant that he only had 20 days in which to get engaged. Although the point was not expressly made, the Tribunal takes this to mean that the development of the parties' relationship took place between late-May and December 2015, a period when both parties claim to have communicated with each other.
31. The Tribunal has considered this information. It accepts that while the parties' relationship may have developed rapidly from the time that they first met each other physically in early-December 2015 till when they became engaged later on that month, the parties claim that they had been developing their relationship through telephone communications over a period of more-than-six months leading up to December 2015.

32. As above, the Tribunal accepts that the parties had been living with each other since the applicant arrived in 2017.
33. The Tribunal heard from the parties about the companionship and emotional support that they draw from each other. The applicant told it that the parties share everything together and that the sponsor shows fidelity and faithfulness. The sponsor said that the parties show each other honesty, love and care for one another. He said that he had been waiting for the opportunity to appear for five years. He said that the applicant was mature and had the same issues as he did. He said that she knows how hard it is in a relationship. In a statutory declaration from December 2022, the sponsor said that the parties care and support each other emotionally.
34. The Tribunal has considered the information in front of it. It found the sponsor to have given evidence in a spontaneous and genuine manner, and for this reason has found him to be a witness of credit. As such, it accepts his evidence on this and other aspects of the parties' relationship. This evidence is given weight.
35. In terms of whether the parties view their relationship as a long-term one, the Tribunal accepts that the parties have been making some, albeit limited, plans about where they want to live. In this regard, it accepts the sponsor's testimony at hearing that he has been liaising with an agent about the possibility of buying real estate, but that this has been put on hold because of the applicant's migration status. Additionally, it accepts his claim in his declaration from December 2022 that the parties wish to undertake travel to Cambodia. This aspect is given weight.
36. The Tribunal finds that the evidence of the nature of the parties' commitment to each other points to them having been in a genuine and continuing relationship and having had a commitment to a shared life as a married couple to the exclusion of all others at all relevant times.

CONCLUSION

37. The task of ascertaining whether the applicant has been the spouse of the sponsor at the relevant times requires the Tribunal to consider and weigh information against itself. While some elements of the parties' relationship cause it some concern, such as their lack of financial integration, it has balanced this against other information that points to the parties' relationship being genuine and continuing. This includes information showing that the parties have been living together since the applicant arrived in Australia in 2017 and have provided each other with companionship and emotional support. Furthermore, in coming to its decision, the Tribunal has given particular weight to the testimony of the sponsor, whom as above it found to be a witness of credit.
38. Having taken into account the matters set out in r.1.15A(3) in relation to the definition of spouse under s.5F(2), and based on the information in front of it and the above findings, the Tribunal accepts that at the time the visa application was made and at the time of this decision the parties have had a mutual commitment to a shared life together as a married couple to the exclusion of all others or that their relationship has been genuine and continuing.
39. Therefore, the parties were in a married relationship for the purposes of s.5F(2) and the applicant is the spouse of the sponsor under s.5F(1) at that time. The applicant meets cl.820.211(2)(a).
40. The Tribunal is satisfied that the applicant was sponsored by the sponsor at the time of application pursuant to cl.820.211(2)(c)(i). Lastly, the Tribunal accepts that the visa

application was made within 28 days after the applicant's previous substantive visa ceased so she is not subject to the Schedule 3 criteria under cl.820.211(2)(d)(ii). Therefore, the applicant meets cl.820.211(2). Because the applicant was not the holder of a Subclass 771 (Transit) visa at the time of application, she meets cl.820.211.

41. The applicant continues to meet the requirements of cl.820.211(2) at the time of decision. She therefore meets cl.820.221(1)(a).
42. There are no sponsorship limitations applicable to the sponsor. Clause 820.221(4)(a) is met and because the sponsor has consented to the disclosure of any relevant conviction, cl.820.221(4)(b) is met. Clause 820.221(4) is met in its entirety and therefore cl.820.221 is met.
43. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa, including those relating to the secondary applicants.

DECISION

44. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211 of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.

David Crawshay
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).